84-520

Docket No. _____

Office - Supreme Court, U.S.
FILED
SEP 26 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term 1984

E.A. GREGORY and VONNA JO GREGORY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Counsel for Petitioners

Peter F. Burns
50 St. Emanuel Street
Post Office Box 1583
Mobile, Alabama 36633
(205) 432-0612

118 pp

QUESTIONS PRESENTED FOR REVIEW

A. Can the government, after exposure to relevant immunized testimony, circumvent its requirement of proving its evidence is untainted by demonstrating that other sources would have led to the information revealed in the immunized testimony?

B. Does the Fifth Amendment protect a witness from having his immunized testimony studied by government investigators who are investigating him for criminal charges relating to that testimony?

PARTIES

The parties in this case when it was before the United States Court of Appeals for the Eleventh Circuit were the United States of America, E. A. Gregory, Vonna Jo Gregory, Gerald Atkinson, and Robert Spurlock.

TABLE OF CONTENTS

	Page
CITATIONS TO OPINIONS BELOW.	1
JURISDICTION	2
STATEMENT OF THE CASE.	3
A. The Gregorys	3
B. Immunized Testimony.	3
C. Exposure	5
D. Use.	9
E. Absence of Prophilactic Measures	13
F. Indictment	15
G. Hearing on Motion to Dismiss . .	16
H. Disposition on Appeal.	18
I. Original Federal Jurisdiction. .	19
ARGUMENT	
I. The lower courts failed to impose Kastigar's requirement that the government demonstrate an independent source even for the evidence challenged by the defendants	21

Page

II. The lower courts' interpretation of what constitutes an impermissible use of immunized testimony fails to protect the Fifth Amendment rights of the defendants 24

III. The application of correct legal principals to the undisputed facts reveals that the defendants' Fifth Amendment rights can only be protected by a dismissal of the indictment 29

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Kastigar v. United States, 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653, reh den 408 U.S. 931, 33 L.Ed. 2d 345, 92 S.Ct. 2478 (1972) 4, 8, 21, 22, 24, 26, 27, 29, 32

United States v. Beery, 678 F.2d 856, 863, n. 5 (10th Cir., 1982) 4, 27, 38

United States v. Gregory, 730 F.2d 692 (11th Cir. 1984). 19, 23, 29, 30, 35

United States v. McDaniel, 482 F.2d 305, 311 (8th Cir., 1973). 27, 31, 32, 38

United States v. Nemes, 555 F.2d 51, 55 (2nd Cir., 1977) 27, 38

United States v. Seiffert, 463 F.2d (1089 (5th Cir. 1972) 4

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. 18 United States Code, Section 6002:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued

under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

CITATIONS TO OPINIONS BELOW

That portion of the hearing wherein the District Court denied the petitioners' motion to dismiss the indictment because of governmental use of immunized testimony is attached hereto as "Exhibit A". The opinion of the United States Court of Appeals for the Eleventh Circuit is attached hereto as "Exhibit B".

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit is dated April 23, 1984. The application for rehearing en banc was denied on July 30, 1984.

The statutory provision which confers jurisdiction on this court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. The Gregorys

E. A. and Vonna Jo Gregory are husband and wife who, prior to their involvement in banking, were self made millionaires with excellent reputations (Tr. Vol. 10, p. 2207, 2208; Tr. Vol. 8, p. 1711; Def. exhibit 6).[1] They purchased controlling interest in the Bank of Camden in November of 1975. Both were elected to the Board of Directors with Mr. Gregory serving as Chairman of the Board. They sold their interest in the bank to Mr. and Mrs. Lyons on April 8, 1977. The bank was closed and the FDIC took control of its assets in April of 1978.

B. Immunized Testimony

On June 19, 1978, the Gregorys filed for relief under Chapter XII of the Bank-

---

[1] Judge Varner made the following observation at the sentencing hearing: "I am impressed that prior to the time you got into the banking business your reputation was excellent, all of you..." (Tr. hearing 4/23/82, p. 6).

ruptcy Act. Corporations which the Gregorys controlled filed for relief under Chapter XI.[2] At the First Meeting of Creditors, July 26, 1978, the Gregorys testified individually[3] and as the designated representatives of the corporations. This testimony was given under a grant of immunity pursuant to 18 U.S.C.A. Section 6002.[4] The testimony

---

[2] The Gregory corporations included the following: Faith Investment Co., Inc. (Tr. Vol. 8, p. 1714); A.L.M., Inc., Jodi Carrousel, JoVonn Hotels of America, Inc., Action Lending Incorporations, Inc., Sea Ranch Properties, and Queeve Development (Tr. Vol. 8, p. 1687). Transactions among these corporations, the Gregorys and the Wilcox County Bank were challenged in the indictment and are integral to the government's case.

[3] Mrs. Gregory testified at the direction of the Bankruptcy Judge by adopting the testimony of Mr. Gregory (Tr. Hearing 3/4/82, exhibit 1 p. 8).

[4] The Gregorys thus received use and derivative use immunity which is coextensive with the Fifth Amendment Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972); United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972); United States v. Beery, 678 F.2d 856 (10th Cir. 1982). (Tr. Hearing 3/4/82, exhibit 1, p. 9 and exhibit 16, p. 1).

at the First Meeting of Creditors paralleled in some instances the allegations of the subsequent indictment (Tr. Hearing 3/5/82, p. 210; appendix "Exhibit A" attached).

C. Exposure

Approximately six months before the immunized testimony, the FBI and FDIC were cooperating in an investigation into the financial affairs of the Gregorys in expectation of criminal charges being filed.[5] The FDIC was represented at the hearing of

---

[5] Prior to April 5, 1978, FDIC Examiner, Lamar Kelly, was in contact with an FBI Agent investigating the Gregorys. As stated in defense exhibit 1, "Both Kelly and the agent feel, there is a better than 90% chance for criminal charges being brought against the Gregorys...". Mr. Kelly was given authority to continue his investigation (Defense exhibit 1 of the in camera proceeding of 3/4/82).

July 26, 1978 by Herbert Adkinson,[6] Robert Blouin,[7] Dee Doher, Lamar Kelly and three attorneys (Tr. Hearing 3/4/82, p. 186, 187; Hearing 3/5/82 p. 31, 32).[8]

---

[6] Mr. Adkinson was the liquidator in charge of Wilcox County Bank (Tr. Hearing 3/4/82, p. 158). He attended practically all of the bankruptcy hearings many of which he knew to be a continuation of the First Meeting of Creditors. He knew the Gregorys were testifying under a grant of immunity, but he did not know the legal effect (Tr. Hearing 3/4/82, p. 161-164).

[7] Mr. Blouin, FDIC liquidator, stayed in Court all day during the immunized testimony. He does not recall the Gregorys being given immunity.

[8] The evidence also strongly suggests that FBI Agents Strickland and Gilman listened to the immunized testimony. James Jerry Wood, an attorney practicing law in Montgomery, Alabama, specifically testified that he saw those two agents in the Courtroom while the Gregorys were testifying and after they had been granted immunity (Tr. Hearing 3/4/82, p. 24). Charles S. Liberis, an attorney in Pensacola, Florida, testified that individuals were pointed out to him by Mr. Wood as being FDIC employees and agents of the FBI who were in the Courtroom during the proceedings (Tr. Hearing 3/4/82, p. 119).

The Gregorys by letter dated August 1, 1979, called the grand jury's attention to

(Footnote 8 continued on the following page)

(Footnote 8 continued):

the government's exposure to immunized testimony at their bankruptcy proceedings. That letter was read to the grand jury by Agent Heisler and the pertinent parts are as follows:

> "Please be advised that both officers of the FBI and representative of the FDIC have at various times been in attendance at examinations <u>of our personal and business affairs which were conducted in the bankruptcy proceedings involving E. A. and Vonna Jo Gregory</u> and related companies and which were subject to the immunity provisions..." (Def. Ex. 3 to Hearing 3/4/82, p. 3-5).

The United States Attorney responded to the letter from Mr. and Mrs. Gregory by advising the grand jury as follows:

> "For your information, at my direction there have been some of the bankruptcy proceeding involving the Gregorys and their holding companies that have been attended by either FBI agents and/or assistant United States attorneys. I believe an agent for the FDIC obtained a copy of some of the bankruptcy applications that were filed. While it is true that certain matters contained in there may not be used in a criminal prosecution because of the compulsory aspects of the bankruptcy law, it is my opinion that none of the conduct of any agent or attorney of the Government at this point constitutes misconduct, and I do not accept that charge and I have denied it, and I have asked simply that

(Footnote 8 continued on the following page)

(Footnote 8 continued):

> this lawyer let us know what it is that he is talking about." (Exhibit 3, Hearing 3/4/82, p. 9).

Clearly, the United States Attorney was responding to allegations that he sent investigators to the personal bankruptcy of the Gregorys.

Finally, the two agents in question admit being in the Federal Courthouse when the bankruptcy proceedings were being conducted, but say that their purpose was to interview Gregory employees (Tr. Hearing 3/5/82, p. 95, 108, 169-172). No Gregory employees were interviewed on that date.

D. Use

Mr. Adkinson had numerous conversations with Lamar Kelly regarding the bankruptcy proceedings and talked to FBI Agent Heisler[9] more than once but less that 5,000 times, since the hearing (Tr. Hearing 3/4/82, p. 166, 175). Mr. Adkinson does not know what he discussed with Agent Heisler on those occasions (Tr. Hearing 3/4/82, p. 175). He testified before the grand jury and was the first witness for the prosecution at trial (Tr. Hearing 3/4/82, p. 159; Tr. Vol. 2, p. 244, 412).

Mr. Blouin has talked with U. S. Attorneys or Assistant U. S. Attorneys, as well as FBI agents Strickland, Heisler, and Long about the Gregorys. He does not recall what was said at the bankruptcy hearing nor what he told the FBI (Tr. Hearing 3/5/82, p. 29-34). Essentially the same thing is true

---

[9] John B. Heisler was the case agent in charge of the Gregory investigation from September of 1978 through trial (Tr. Hearing 3/5/82, p. 175).

of Ms. Doher. She has reviewed Gregory files with Agent Heisler; she does not remember the grant of immunity, what was said at the hearing or what she told Agent Heisler (Tr. Hearing 3/5/82, p. 43, 46-48).

Mr. Kelly listened to the entire immunized testimony of the Gregorys; prepared a memorandum of that testimony for the FDIC files, and thinks he sent a copy of that memo to Mr. Beasley,[10] (Tr. Hearing 3/4/82, p. 186, 187; Tr. Hearing 3/5/82, p. 3). He prepared a memorandum from which Mr. Adkinson testified at trial (Tr. Vol. 2, p. 276).

After the immunized testimony, FDIC Examiner, Lamar Kelly, was designated under Rule 6(e) Federal Rules of Criminal Procedure, as a government employee to whom the United States Attorney had made

---

[10] Mr. Beasley was the Regional Director of the Federal Deposit Insurance Corporation and government trial witness (Tr. Vol. 7, p. 1366-1307).

disclosure of secret grand jury information and from whom he could seek assistance in the performance of his duty to enforce federal criminal law (Tr. Hearing 3/4/82, p. 203, 204; Def. exhibit 3 of that Hearing, p. 39). On January 31, 1979, the United States Attorney for the Southern District of Alabama requested that Kelly be allowed to freely assist the FBI, U. S. Attorney's Office and grand jury in the investigation of the Gregorys. This request was granted with the limitation that:

> "In addition, Mr. Kelly must be instructed that while he is assisting the United States Attorney he is functioning only as an agent of the Department of Justice or the United States Attorney's Office and not as a representative of the FDIC." (Def. exhibit 21; Tr. Hearing 3/4/82).

Mr. Kelly did not know that the prosecution was prohibited from making either direct or indirect use of the immunized testimony. In regard to the grant of immunity, he testified:

"I believe there was some attorney talk regarding immunity, but I'm not an attorney, so I don't know the legal effect of that." (Tr. Hearing 3/4/82, p. 188).

Mr. Kelly has had numerous conversations with FBI agents, Assistant U. S. Attorneys or U. S. Attorneys since 1978 in relation to criminal proceedings against the Gregorys and he cannot recall the specifics of those conversations (Tr. Hearing 3/5/82, p. 7-10). Nor can he recall the specifics of the immunized testimony (Tr. Hearing 3/5/82, p. 7). He does recall discussing Dr. Don, Rolphe McCollister, Mr. Whitehead[11] and the "excessive use of uncollected funds" by the Gregorys with FBI agents on numerous occasions (Tr. Hearing 3/4/82, p. 197-198).

Kelly played an active part in the investigation and he divulged all informa-

---

[11] These men are creditors of the Gregorys who owed money to the Wilcox County Bank. Don and McCollister are mentioned in paragraphs five and nineteen of the indictment respectively. All three were interviewed for the first time after the immunized testimony.

tion known to him. He understood that as an agent of the grand jury:

> "...that I was to cooperate fully with both the FBI in their investigation and the grand jury...I was to testify freely before the grand jury. That means everything that I had knowledge of." (Tr. Hearing 3/4/82, p. 204-206).

Mr. Kelly also helped the U. S. Attorney's Office and the FBI analyze financial documents and other records pertaining to the Gregorys (Tr. Hearing 3/4/82, p. 205, 206). He was so valuable in the preparation of the case that the prosecutor requested that he be allowed to assist at counsel table during presentation of evidence to the jury (Tr. Vol. 1, p. 195, 196).

E. Absence of Prophilactic Measures

In September of 1978, two months after the immunized testimony, Agent Heisler became case agent in charge of the Gregory investigation (Tr. Hearing 3/4/82, p. 175). He did not know that the Gregorys had testified under a grant of immunity until on or

about 3/4/82--three and one-half years after the testimony and four days before trial. Naturally, he did not instruct his agents to attempt to shield themselves from immunized testimony (Tr. Hearing 3/5/82, p. 205, 208) the first immunized testimony occurred approximately twenty months before the indictment was returned. After the immunized testimony, 65% of the FBI 302 reports were taken and fourteen of the government's twenty-two trial witnesses were interviewed.[12] None of the FDIC personnel were cautioned against using immunized testimony or leads gained therefrom in assisting in the investigation of the Gregorys (Tr. 3/5/83, p. 63, 64--Herb Adkinson, 188--Lamar Kelly, 44-45--Ms.

---

[12] The 14 government witnesses interviewed for the first time by the FBI after the immunized testimony are Harvey DeWesse; Lewis C. Beasley; Rolphe McCollister; Bill G. Agall; Millard C. Hall; Dr. H. M. Don; Eugene M. Finkelstein; A. L. Johnson, Sr.; Dan B. Cook; Joe C. Williams; James E. Branum; John R. Liggon; Charles A. Whitehead; Cathy W. Craig (Tr. Hearing 3/4/82; Def. exhibit 2).

Doher). Thus, the immunized testimony came at an early stage of the investigation. The people who heard the testimony did not know of the prohibition against its use in a criminal prosecution and the agent in charge of the investigation did not even know that there had been immunized testimony.

F. Indictment

On May 30, 1980, the grand jury returned an indictment against the Gregorys, G. W. Atkinson, Robert T. Spurlock, Jr., and Mark Lyons, III (R. 1). The indictment, Criminal Case No. 80-00025, charged conspiracy (18 U.S.C. Section 1014); wire fraud (18 U.S.C. Section 1343); willful misapplication (18 U.S.C. Section 656); and aiding and abetting (18 U.S.C. Section 2) in the misapplication of monies, funds and credits of the Wilcox County Bank, f/k/a Bank of Camden. The Gregorys pled not guilty and on June 30, 1980, filed several pre-trial

motions. Among those was a motion to dismiss the indictment because, among other things, government agents exposed themselves to immunized testimony (R. 232).

G. Hearing on Motion to Dismiss

On March 4 and 5, 1982, the Gregorys were afforded a hearing on their motion to dismiss the indictment based upon improper use of immunized testimony. During that hearing, the Trial Judge incorrectly put the burden of proof on the Gregorys to:

> "...demonstrate to this Court that there is testimony contained and where it is contained and what it is that was given at the immunized proceeding and how that appears in any count of the indictment. And when that has been done, the government will then have the burden of demonstrating to me that the information that they got that produced that was not from the grand jury (sic) immunized testimony." (Tr. Hearing 3/4/82, p. 17)[13]

---

[13] The Gregorys conducted the hearing pro se and as they ably pointed out to the Court, they understood that the law and the Court's prior order put the burden on the government to go forward. On six separate occasions the Gregorys argued that the burden ofroof was being improperly placed on them (Tr. Hearing 3/4/82, p. 4, 15-17, 19 and 128-141).

The Gregorys then demonstrated that their immunized testimony revealed matters related to the indictment. In evaluating the impact of the government's exposure to immunized testimony, the Court erroneously ruled that:

> "I think you may have travelled under a misapprehension, though you may not. The fact that you get immunity does not preclude anyone from listening to that or being present or having it available and studying it. What they are precluded from doing is using it in any way." (Tr. Hearing 3/5/82, p. 209; appendix "Exhibit A" attached).

Finally, the Trial Court impermissibly speculated that the government would have ultimately discovered the evidence without the immunized testimony and therefore, the Gregorys' motion was due to be denied because they did not demonstrate that the government relied upon their immunized testimony. The Court's language in that regard is as follows:

> "...that there were adequate sources outside of that testimony that would have led to what the Government ultimately did in its indictment.

And though it might have paralleled in some instances the testimony that you gave, that does not mean the Government relied on your testimony to come by those sources, and this Court so holds. So be ready to go to trial Monday. I deny the motion. This Court is adjourned." (Tr. Hearing 3/5/82, p. 210; appendix "Exhibit A" attached).

H. Disposition on Appeal

The Eleventh Circuit affirmed "the holding of District Court in all respects as to the evidence considered." The Appellate Court however could find no precedent for the District Court's procedure of limiting the government's burden to addressing only the matters addressed by the Gregorys. Therefore, the convictions were vacated and the cases remanded

> "...for the limited purpose of allowing the District Court to ascertain whether the portions of the government's evidence at trial not challenged by the Gregorys and the evidence before the grand jury, not formerly considered by the District Court, were in fact 'derived from a legitimate source wholly independent of the compelled testimony: Kastigar, 406 U.S. at 460, 92 S.Ct. at 1664." United States v.

Gregory, 730 F.2d 692 (11th Cir., 1984).

I. Original Federal Jurisdiction

The District Court had jurisdiction pursuant to 18 U.S.C., Section 3231.

ARGUMENT

By affirming the trial court as to the evidence considered, the Eleventh Circuit sanctioned a hearing in which:

A. The wrong party was obliged to carry the initial burden of proof,[14]

B. No finding was made that the challenged evidence came from a legitimate independent source, and

C. The Court applied an unconstitutional standard for determining "use" of immunized testimony.

The Gregorys challenged the evidence which most closely paralleled their immunized testimony. If certiorari is denied, the evidence previously challenged will not be dealt with on remand. Thus, the Gregorys will have never had a proper hearing as to the majority of the questionable evidence. The importance of this petition is compounded because if this Court does not intervene, the

---

[14] The Eleventh Circuit cured this error in its instructions on remand. It is mentioned here to demonstrate the degree to which the District Court departed from the usual and accepted course of legal proceedings.

same constitutional defects will permeate the hearing on remand. Thus, this Court is being asked to correct serious constitutional violations which have already occurred and to prevent the same violations from being repeated in the immediate foreseeable future.

ARGUMENT I.

The lower courts failed to impose Kastigar's requirement that the government demonstrate an independent source even for the evidence challenged by the defendants.

The philosophical basis for legitimizing testimony compelled pursuant to 18 U.S.C., 6002 is that the total prohibition against prosecutorial use mandated in Kastigar v. United States, 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653, reh den 408 U.S. 931, 33 L.Ed. 2d 345, 92 S.Ct. 2478 (1972), will assure that the accused and the prosecution are left in substantially the same position as if the accused had

exercised his Fifth Amendment privilege. The protection of the accused comes from the prosecution's burden of proving a legitimate source for all of its evidence. This Court in Kastigar explained the burden as follows:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
>
> This is a very substantial protection, commensurate with that resulting from invoking the privilege itself...This statute (18 U.S.C. 6002) which operates after a witness has given incriminatory testimony, affords the same protection (as the Fifth Amendment) by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties." (at 226).

The lower courts did not find that the prosecution's evidence came from legitimate independent sources. Rather, the District Court found:

> "Based on what I have heard in connection with all of this evidence, it abundantly appears to this Court that there were adequate sources outside of that testimony that would have lead to

> what the Government ultimately did in its indictment. And though it might have paralleled in some instances the testimony that you gave, that does not mean the Government relied on your testimony to come by those sources, and this Court so holds. So be ready to go to trial Monday. I deny the Motion. This Court is adjourned." (Hearing 3/5/82, p. 210; appendix "Exhibit A" attached hereto)[15] (emphasis added)

The court was not at liberty to speculate as to what the prosecution would have found. The purpose of the hearing was to insure that the government's evidence came from independent sources. That was not done.

Even if the prosecution's sources would have led to the indictment if the immunized testimony was "used" as a short cut in the investigation the indictment must be dismissed. The inquiry conducted by the

---

[15] The Eleventh Circuit ruled that the District Court's finding of fact was not clearly erroneous (Gregory, appendix B, p. 2767, n.2). Perhaps not, but the focus of the inquiry was clearly erroneous because it focused on what the government would have found not how they found what they did. Nowhere does the District Court say that the government's evidence came from wholly independent sources.

lower courts fails to insure that the Fifth Amendment rights of one testifying under a grant of immunity are protected. The Fifth Amendment requires, at a minimum that the defendants get a new hearing as to all of the evidence.

ARGUMENT II.

The lower courts' interpretation of what constitutes an impermissible use of immunized testimony fails to protect the Fifth Amendment rights of the defendants.

This Court balanced the citizen's Fifth Amendment right to refuse to incriminate himself against society's right to compel testimony pursuant to 18 U.S.C. Section 6002 by ruling that the immunity afforded by the statute is coextensive with the Fifth Amendment, Kastigar v. United States, supra, The Court mandated that comprehensive safeguards be employed to insure that the individual and the prosecution remain in substantially the same position as if the

individual had refused to testify. In rejecting the argument that it was impossible to compel testimony under 18 U.S.C., 6002 and protect the Fifth Amendment, this Court stated:

> "Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.
>
> This argument presupposes that the statute's prohibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect of the compelled testimony and any information derived therefrom:
>
> 'No testimony or other information compelled under the order (or any use, direct or indirectly derived from such testimony or other information) may be used against the witness in any criminal case...'

> This total prohibition on use provides a comprehensive safeguard barring the use of compelled testimony as an 'investigatory lead', and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures. (at 459-460)

The Gregorys have not been afforded the comprehensive safeguards mandated by Kastigar. In ruling that the immunized testimony had not been "used", the District Court erroneously explained to the Gregorys:

> "I think you may have travelled under a misapprehension, though you may not. The fact that you get immunity does not preclude anyone from listening to that or being present or having it available and studying it. What they are precluded from doing is using it in any way." (Tr. Hearing 3/5/82, p. 209; appendix "Exhibit A" attached hereto).

Obviously, listening to immunized testimony, having it available and studying it is a prohibited use under Kastigar. By affirming the District Court, the opinion of the Eleventh Circuit conflicts with Kastigar and its progeny (see e.g. United States v. Nemes, 555 F.2d 51, 55 (2nd Cir., 1977);

United States v. Beery, 678 F.2d 856, 863 n.5 (10th Cir., 1982) and United States v. McDaniel, 482 F.2d 305, 311 (8th Cir., 1973).

The importance of this error cannot be exaggerated. The lower courts have defined "use" in such a way that the government can circumvent the Fifth Amendment. Suppose the accused is granted Section 6002 immunity by one of the District Courts in the Eleventh Circuit. Must his attorney advise him that, if he testifies, the government can read, listen to and study his testimony? If he does not testify he goes to jail for contempt. If he lies he is guilty of perjury. The client might then ask: "What happened to my right not to incriminate myself?" It would be hard to explain how he had not been forced to incriminate himself when the people who were investigating him studied his testimony and then obtained his

indictment based on matters discussed in the immunized testimony.

Perhaps if there was no interaction between those investigating the accused and those exposed to immunized testimony, precautions could be taken to prevent a Fifth Amendment violation. Where, as here, those exposed to the testimony are active in the investigation the privilege against self-incrimination is dependent upon the government's ability to unring the bell. That cannot be done. Nor can the Fifth Amendment rights of the Gregorys be protected in this fact situation. The Gregorys are entitled, at the very least, to a new hearing with the concept of "use" properly defined and applied to all of the evidence.

ARGUMENT III.

The application of correct legal principals to the undisputed facts reveals that the defendants Fifth Amendment rights can only be protected by a dismissal of the indictment.

The undisputed facts render the government's burden of proof under Kastigar nondischargeable. Those facts are:

1. The FBI and FDIC were actively investigating the Gregorys in anticipation of criminal proceedings when the Gregorys gave immunized testimony. United States v. Gregory, appendix "Exhibit B" at 2766.

2. The testimony came at an early stage of the investigation and related to matters ultimately charged in the indictment. (Testimony 7/26/78; indictment 5/30/80; R. 1, and Gregory, supra).

3. Several FDIC representatives including Lamar Kelly, who was active in the criminal investigation, listened to the immunized testimony. (Tr. Hearing 3/4/82, p. 186, 187 and Def. exhibit 1 to said hearing; Hearing 3/5/82, p. 31).

4. No precautions were taken to insulate the investigation from the immunized testimony. (Tr. Hearing 3/5/82, p. 44, 45, 63, 64, 188, 205, 208).

5. After the immunized testimony, the FDIC representatives in question participated extensively in the investigation and prosecution of the Gregorys. (Adkinson Tr.

Hearing 3/4/82, p. 159, 166, 175; Blouin Tr. Hearing 3/5/82, p. 29-34; Doher Tr. Hearing 3/5/82, p. 43, 46-48; Kelly Tr. Hearing 3/5/82, p. 7-10).

6. None of the FDIC representatives remember the substance of the immunized testimony or what they subsequently told the FBI. (Please see authority for paragraph number 5 above).

7. After hearing the immunized testimony, Lamar Kelly functioned as an agent of the Department of Justice or the United States Attorney's Office in order to fully assist the prosecution in the preparation of its case against the Gregorys. (Def. exhibit 1; Tr. Hearing 3/4/82).

8. 65% of the FBI 302 reports were taken after the immunized testimony. (Def. exhibit 2; Tr. Hearing 3/4/82).

Admittedly, the FDIC personnel denied that the immunized testimony was used but those denials carry no logical force. The hearing was held three and one-half years after the immunized testimony. The witnesses did not remember the substance of the immunized testimony or what they told the FBI.[16] Therefore, there was no factual basis from which they could admit or deny

repetition or other use of the testimony. If I do not remember what I heard and I do not remember what I said, can I effectively deny that I said what I heard?

In United States v. McDaniel, 482 F.2d 305 (8th Cir., 1973), the United States Attorney read the defendants' immunized testimony before the indictment but after all of the prosecution's trial evidence was obtained. In dismissing the indictment the Court noted various ways in which the immunized testimony could have been used:

> "Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." (at 311)

In McDaniel, as here, the prosecution denied that it used the immunized testimony. In

---

[16] (Adkinson Tr. Hearing 3/4/82, p. 159, 166, 175; Blouin Tr. 3/5/82, p. 29-34; Doher 3/5/82, p. 43, 46-48; Kelly Tr. 3/5/82, p. 7-10).

response, the Court stated:

> "...we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind..." (at 312)

Nor could the immunized testimony be wholly obliterated from the minds of the investigators in the case at bar. They did not even know they were supposed to attempt to obliterate the protected testimony. It would be coincidental beyond belief if, in their numerous FBI interviews after exposure to the immunized testimony, nothing that was learned from the immunized testimony was "used" as prohibited by Kastigar.

The government has not shown, and cannot possibly show, that Lamar Kelly learned nothing from the immunized testimony that helped him form opinions, analyze documents or understand transactions. For example, eleven months after the immunized testimony Lamar Kelly expressed the following opinion to the grand jury:

"Now, I think that a review of the bankruptcy proceeding and events which have taken place since these dates that I mentioned here disclosed that Mr. and Mrs. Gregory did not have a separate and distinct worth. The corporations had intercompany transfers. They owed each other money to such a degree that Mr. and Mrs. Gregory have filed petitions in bankruptcy which say specifically that their assets are not capable of separation at the present time. And they have not been separated since the date they filed those petitions. But there is no doubt that in my judgment, Mr. and Mrs. Gregory did not have separate and distinct worth, and they had not had that separate and distinct worth at the time they obtained these loans." (Def. exhibit 3; Hearing 3/4/82, p. 147).

Certainly, his opinion was buttressed by, if not based upon, the following immunized testimony:

"Q: How much cash did A.L.M. receive?
A: There was $227,000.00.
Q: Can you tell us how that cash was disposed of?
A: Yes, sir.
Q: Would you please do so?
A: There was approximately $80,000.00 paid back to either E. A. or Vonna Jo Gregory, I don't remember which way it went on the thing. It was through our family, a loan that had been made. There was approximately $80,000.00 then loaned to us. There was some

$20,000.00 or around $25,000.00, I think, paid back to Jodi's Carrousel, Inc., which had been loaned from them." (Tr. Hearing 3/4/82, Def. exhibit 1, p. 40, 41).

"Q: And there have been transfers of funds, as I understand it, back and forth between the various corporations?
A: Yes, sir.
Q: And not all of these transfers have been evidenced by promissory notes?
A: I didn't hear that.
Q: I say, not all of these transfers have been evidenced by promissory notes. Is that correct.
A: No. A physical note?
Q: Right.
A: That's correct." (Tr. Hearing 3/4/82, Def. exhibit 1, p. 70, 71).

"Q: How the proceeds of these loans at the Eastern Shore National Bank --
A: Our companies constantly have intercorporate loans, and on that particular day, I just right off the top of my head, I don't know. Our record cards would reflect the in and out of all funds, whatever the disbursements might have been.
Q: In the inter-company loans, the companies did not sign promissory notes? When Gregory Motors, for instance, would borrow money from Faith Investment, as an example, was a promissory note signed?
A: Not always, no." (Tr. Hearing 3/4/82, Def. exhibit 1, p. 118, 119).

The government has not shown why Agall, Whitehead, Liggon and McCollister,[17] among others, were interviewed for the first time after the immunized testimony (Tr. Hearing 3/4/82, Def. exhibit 2). The source of this evidence is said to be review of bank records in April of 1978 or before July of 1978 (United States v. Gregory, appendix "Exhibit B", p. 2767 n.2). Certainly, the investigators had the bank records in April of 1978 but those records pertained to thousands of transactions. They would not reveal which Wilcox County Bank borrowers had personal dealings with the Gregorys. After the immunized testimony, Wilcox County Bank borrowers who were creditors of the Gregorys were interviewed. Certainly, the

---

[17] The government's theory was that the Gregorys were able to misapply bank funds by causing these men to borrow from the Wilcox County Bank and then borrowing money from them. Liggon and McCollister are mentioned in the indictment. All four of them testified at trial.

discussion of Gregory creditors in the immunized testimony helped focus the investigation on Wilcox County Bank borrowers who were creditors of the Gregorys.

The Fifth Amendment prohibits a person from being compelled to be a witness against himself in a criminal case. While under criminal investigation and in the presence of government investigators, the Gregorys were called upon to give potentially incriminating testimony. Before they testified their lawyer explained in open court that thirty-nine criminal indictments had been returned against them and dismissed. He requested that everyone have a "clear understanding" that his clients would "enjoy use immunity against any direct or indirect use of their testimony here and in any subsequent criminal proceeding." No one objected and the judge granted the immunity. (Tr. Hearing 3/4/82, Def. exhibit 1, p. 9).

None of the government personnel left the courtroom. Instead, they listened and took notes while the Gregorys testified about matters pertaining to the criminal investigation. Subsequently, individuals and transactions described in the immunized testimony were investigated for the first time.

The Gregorys were rightfully advised by counsel that the Fifth Amendment provided them a substantial protection. They were undoubtedly told that they could testify fully and truthfully without fear of their testimony being used against them either directly or indirectly. The lower courts have made a mockery of that advice. The courts have told the Gregorys that the government can listen to and study their immunized testimony. They have also told the Gregorys that the government had sources that would have led to the discovery of the same evidence and therefore the Gregorys'

Fifth Amendment rights were not violated.

Had the fact situation arisen in the Second, Eighth or Tenth Circuits, it is safe to assume the indictments would have been dismissed (see e.g. United States v. Nemes, 555 F.2d 51 (2nd Cir. 1977); United States v. Beery, 678 F.2d 856 (10th Cir., 1982); United States v.McDaniel, 482 F.2d 305 (8th Cir., 1973). Citizens in the Eleventh Circuit are entitled to the same Fifth Amendment rights as citizens of other circuits.

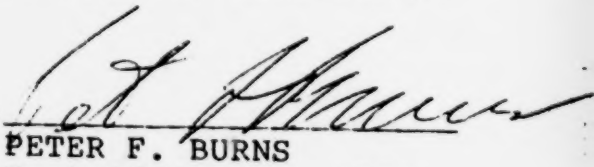
CONCLUSION

The lower courts have failed to provide the Gregorys with the substantial safeguards promised by this Court to those who testify under a grant of immunity. Only this Court's intervention will prevent the lower courts from applying the same unconstitutional principals at the hearing on remand. Therefore, your petitioner respectfully

request that this Honorable Court grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MORGAN & BURNS
Attorneys for Petitioners

BY: 

PETER F. BURNS
Post Office Box 1583
Mobile, Alabama 36633
(205) 432-0612

APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	CIVIL ACTION NO.
VS:	*	CR 80-00025
E. A. GREGORY AND VONNA JO GREGORY,	*	
Defendants.	*	

On March 5, 1982, the District Court denied the Gregory motion to dismiss the indictment based upon improper use of immunized testimony. The following quotation appears in the transcript of the hearing of March 5, 1982 at pages 209 and 210:

"THE COURT: Any rebuttal?

MR. GREGORY: Your Honor, we don't have any rebuttal, but we are ready, if you want us to, to make our closing statement --

THE COURT: The Court doesn't need any

closing statements. I will let you reserve your closing arguments and your reference to the law to the Court of Appeals. This Court has heard two days of testimony in this matter, and in those two days of testimony the only immunized testimony that was presented to the Court was the transcript of the first meeting of the creditors. I think you may have travelled under a misapprehension, though you may not. The fact that you get immunity does not preclude anyone from listening to that or being present or having it available and studying it. What they are precluded from doing is using it in any way. Basically the testimony that was given at the Bankruptcy hearing dealt with matters and things that were averred in the Petition of Bankruptcy, all of which is a public record and available to anyone for their use or study. That portion of that testimony for the selection of the committee is not immunized

testimony. The only immunized testimony was the testimony that you specifically gave and the testimony that Vonna Jo Gregory specifically gave. Based on what I have heard in connection with all of this evidence, it abundantly appears to this Court that there were adequate sources outside of that testimony that would have led to what the Government ultimately did in its indictment. And though it might have paralleled in some instances the testimony that you gave, that does not mean the Government relied on your testimony to come by those sources, and this Court so holds. So be ready to go to trial Monday. I deny the Motion. This Court is adjourned."

EXHIBIT B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

E. A. GREGORY, VONNA JO GREGORY, G. W. ATKINSON and ROBERT T. SPURLOCK, JR.,

Defendants-Appellants.

Nos. 82-7145, 82-7152

United States Court of Appeals, Eleventh Circuit

April 23, 1984

Defendants were convicted before the United States District Court for the Southern District of Alabama, Robert E. Varner, Chief Judge, of conspiracy to misapply bank funds, make false statements to banks and commit wire fraud, with two defendants also convicted of substantive counts of misapplication of bank funds, and defendants appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) trial court should have considered whether

evidence not challenged by defendants was fruit of prior immunized testimony in bankruptcy proceeding; (2) claimed violations of Jury Selection Act, including failure to prepare alphabetical list of names taken from master jury wheel, did not require dismissal of indictment; (3) admission of temporary cease and desist entered by Federal Deposit Insurance Corporation was not abuse of discretion; and (4) evidence supported convictions.

Affirmed in part and vacated and remanded in part with directions.

1. Criminal Law 1158(4)

In light of the Government's independent sources for evidence presented at trial, independent sources for information revealed in immunized testimony given in bankruptcy proceeding and testimony that immunized testimony had not been used in the investigation, conclusion that the

Government showed independent, legitimate sources for the evidence claimed to be improperly tainted was not clearly erroneous. Bankr.Code, 11 U.S.C.A. Section 344; 18 U.S.C.A. Section 6002.

2. Criminal Law 1181

Since defendants, who had given immunized testimony in bankruptcy proceedings, could not be presumed to have knowledge of all the evidence presented to grand jury or employed in Government's investigation in instant criminal proceeding, a ruling only on those items identified by defendants as having been revealed in bankruptcy proceeding was not sufficient and remand was necessary to allow the court to ascertain whether a portion of the Government's evidence used at trial and not challenged and evidence before the grand jury were in fact derived from legitimate sources wholly independent of the compelled

testimony. Bankr.Code, 11 U.S.C.A. Section 344; 18 U.S.C.A. Section 6002.

3. Grand Jury 36.8

Phrase "criminal case" in statute prohibiting use of immunized testimony in any criminal case includes grand jury proceedings as well as trial. 18 U.S.C.A. Section 6002.

See publication Words and Phrases for other judicial constructions and definitions.

4. Grand Jury 2-1/2

Jury 33(1.1)

Substantial violation of Jury Selection Act will be found only when two important general principles are frustrated, those principles being random selection of juror names and use of objective criteria for determination of the disqualifications excuses, exemptions, and exclusions. 28 U.S.C.A. Sections 1861-1869.

5. Grand Jury 2-1/2

Jury 33(1.1)

Mere technical deviations from requirements of Jury Selection Act or even a number of them are insufficient if they do not frustrate the obtaining of jury lists that represent a cross section of the relevant community and do not result in impermissible forms of discrimination and arbitrariness. 28 U.S.C.A. Sections 1861-1869.

6. Grand Jury 2-1/2

Under Jury Selection Act, it is the master jury wheel and not the actual grand jury which must be geographically proportional. 28 U.S.C.A. Section 1863(b)(3).

7. Grand Jury 2-1/2

Although residents of Mobile County, Alabama were the most numerous on the venire, the venire was substantially

proportional geographically as Mobile County is the most populus county in the district from which master jury wheel is selected under Jury Selection Act. 28 U.S.C.A. Section 1863(b)(3).

8. Grand Jury 2-1/2

A party claiming violation of Jury Selection Act by disproportionate representation of a particular group in the jury selection process must show a substantial disparity between that group's representation in the selection process and its representation in the general population. 28 U.S.C.A. Section 1863(b)(3).

9. Grand Jury 2-1/2

Venires or grand juries need not reflect county populations exactly. 28 U.S.C.A. Section 1863(b)(3).

10. Grand Jury 2-1/2

Although methods used in grand jury selection may have resulted in venires that

were not statistically random, there was not violation of Jury Selection Act absent showing that procedure resulted in discriminatory selection of jurors or otherwise prevented jury panels from consisting of fair cross sections of the community. 28 U.S.C.A. Section 1863(b)(3).

11. Grand Jury 2-1/2

There were no substantive violations of Jury Selection Act requiring dismissal of indictment notwithstanding failure to prepare alphabetical list of names taken from master jury wheel, failure to execute affidavits indicating that the clerk verified accuracy of county voter registration lists as opposed to relying on spot checks, want of certificate of appropriate county official indicating that all registered voters had been considered in the selection process, want of document verifying that order to produce 70 names for

grand jury venire was carried out as specified, failure to systematically process completed juror qualifications forms and failure to retain county voter registration list used in constructing master jury wheel, there being no allegation of any discrimination, either by design or effect. 28 U.S.C.A. Sections 1861-1869.

12. Criminal Law 1144.13(3,5)

In reviewing sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the government and makes all reasonable inferences with support of the verdict.

13. Banks and Banking 509

While valid consent of board of directors of the bank is the defense to misapplication of bank funds, the board cannot validate a fraud on the bank and, thus, if coconspirators intend to defraud, approval of the board is no longer material

to whether there was a misapplication. 18 U.S.C.A. Sections 371, 656.

14. Conspiracy 11

That bank directors may have reviewed subject transactions at some point did not absolve coconspirators from culpability for misapplication of bank's funds, particularly where evidence showed that defendants' control of the bank was the moving force behind many of the board's actions. 18 U.S.C.A. Sections 371, 656.

15. Conspiracy 47(3)

Although defendants spouses' intent to injure bank, which they controlled could not be directly proved through actions which were against bank rules or outside their authority, there was sufficient evidence of their intent to support conviction of conspiracy to misapply bank funds in view of the knowing, voluntary actions of spouses which tended to injure the bank, including

evidence that in establishing correspondent accounts the board was not informed of extent of spouses' dealings with the proposed correspondent banks, was not informed that state banking department had disapproved of separate lines of credit for each spouse or that spouses' corporations, which performed services for bank, was to receive a commission. 18 U.S.C.A. SEctions 371, 656.

16. Banks and Banking 509

There was sufficient evidence to conclude that although defendant spouses had sold their controlling stock interest in bank they were "connected" with the bank, for purpose of prosecution for misapplying bank funds, in that they retained a security interest in the stock that buyer defaulted, that spouses retained voting rights on matters affecting capitalization and that bank had a heavy concentration of loans to

spouses and, in any event, there was evidence warranting inference that buyer allowed bank to extend loans to spouses' corporations because of his personal debt to the spouses. 18 U.S.C.A. Section 656.

See publication Words and Phrases for other judicial constructions and definitions.

17. Banks and Banking 509

Conviction of vice-president/secretary of board of directors of bank for misapplying bank funds was supported by evidence that he generally managed day-to-day affairs, received a loan from second bank before instant bank purchased participations in loans from that bank, obtained unsecured loans from bank at time he already had outstanding debts an signed notes for loans to former owners although he was aware of Federal Deposit Insurance Corporation warnings about concentrations of credit with former owners. 18 U.S.C.A. Sections 371, 656.

18. Banks and Banking 509

Evidence that bank vice-president went to sister state, received check and transmitted funds was sufficient to infer that vice-president was a knowing participant in scheme to misapply bank funds. 18 U.S.C.A. Section 371, 656.

19. Banks and Banking 509

There was no abuse of discretion in admitting cease and desist order entered by Federal Deposit Insurance Corporation, as order was within time frame of indictment charging misapplication of bank funds and was part of general background of controversy between defendants and the agency, defense was that financial affairs crumbled when agency cut off defendants' credit and order issued the day after last bank loan to defendants' corporation and court considered order's relevance in

chambers with counsel. 18 U.S.C.A. Sections 371, 656.

20. Criminal Law 674

There was no abuse of discretion in admission and later exclusion of check kite where, at time the evidence was excluded the jury, in prosecution for misapplication of bank funds, had heard witness' testimony that defendants were not conducting a check kite, Federal Deposit Insurance Corporation's examiner had not given his opinion as to check kiting and court gave prompt curative instruction. 18 U.S.C.A. Section 371, 656.

21. Criminal Law 675

There was no error in excluding certain evidence of defendants' prior credit and employment history where such evidence, even if relevant to the defense, was cumulative.

22. Criminal Law 1148

To warrant reversal for abuse of

discretion in decision whether to sever defendants, defendants bear burden of showing specific and compelling prejudice.

23. Criminal Law 1166(6)

There was no showing of prejudice in joinder of defendant's prosecution for conspiracy to misapply bank funds, make false statements to banks and commit wire fraud, and substantive misapplication of bank funds. 18 U.S.C.A. Sections 2, 371, 656, 1014, 1343.

24. Criminal Law 951(1), 977(1)

If within seven days of verdict the trial court orally extended the time for moving for judgment of acquittal and for new trial, it did not lose jurisdiction over the motion because its ruling was not reduced to writing within that seven-day period. Fed. Rules Cr.Proc.Rules 299(c), 33, 18 U.S.C.A.

25. Criminal Law 753.2(8)

In considering a motion for judgment of acquittal, the evidence must be considered in the light most favorable to the government, together with all inferences reasonably drawn from the facts, to determine whether there is substantial evidence from which a jury could reasonably find guilt beyond a reasonable doubt.

26. Criminal Law 753.2(5)

Where evidence was sufficient to sustain convictions it is improper to grant motions for judgment of acquittal.

27. Criminal Law 911

Grant or denial of a motion for new trial rests in the sound discretion of the trial court.

Appeals from the United States District Court for the Southern District of Alabama.

Before GODBOLD, Chief Judge, RONEY and SMITH*, Circuit Judges.

RONEY, Circuit Judge:

E. A. Gregory, Vonna Jo Gregory, G. W. Atkinson and Robert T. Spurlock appeal their convictions for a conspiracy to misapply bank funds, make false statements to banks and commit wire fraud, in violation of 18 U.S.C.A. Sections 371, 656, 1014 and 1343. The Gregorys and Atkinson also appeal their convictions for substantive counts of misapplication of bank funds, 18 U.S.C.A. Sections 656, 2. They challenge (1) the Government's use of immunized testimony given by the Gregorys at a bankruptcy creditors' meeting, (2) the procedures used to select the grand jury, (3) the

*Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

sufficiency of the evidence supporting their convictions, (4) evidentiary rulings by the trial court, (5) the court's denial of severance for Atkinson and Spurlock, and (6) the court's denial of motions for new trial and acquittal. We vacate the Gregorys' convictions, and remand for a hearing to afford the Government an opportunity to show that all of its evidence not formerly examined by the district court was derived from legitimate, independent sources. We affirm as to all other issues.

The conspiracy alleged in this case concerns events which occurred while E. A. Gregory and Vonna Jo Gregory controlled an Alabama Bank. The Gregorys purchased a controlling interest in the Bank of Camden (Alabama) in November, 1975. Both were elected to the Board of Directors, and Mr. Gregory became Chairman of the Board. The bank was renamed Wilcox County Bank (Bank). While the Gregorys held a controlling

interest in the Bank, defendant G. W. Atkinson was the Secretary to the Board of Directors and a Vice-President of the Bank. Defendant Robert T. Spurlock, Jr., was a Vice-President of the Bank and became a member of the Board. The criminal charges of conspiracy to misapply bank funds, make false statements and commit wire fraud grew out of transactions between the Wilcox County Bank and the Gregorys, their corporations, and their associates, which involved the Bank's (1) purchase of participations in loans from other banks which had loaned money to the Gregorys and their corporations; (2) opening of correspondent bank accounts with banks which were controlled by or hand loaned money to the Gregorys, (3) purchase of goods and services from the Gregorys and their corporations; (4) loans to associates of the Gregorys who lived outside the Bank's trading area; and (5) loans to the Gregorys

themselves.

The substantive counts of misapplication of bank funds involve loans made by the Bank to Gregory-owned corporations after the Gregorys sold their bank stock to Mr. and Mrs. Mark Lyons III on April 8, 1977. The Gregorys retained voting rights in matters affecting capitalization of the Bank. Mr. Lyons was then elected Chairman of the Board, and he also became Executive Vice-President and a member of the loan committee. Between April 15, 1977, and May 10, 1977, the Bank made ten loans to corporations owned by the Gregorys, for a total of $864,000. These loans were approved by the Board of Directors or by the loan committee and also by Lyons.

The facts will be developed further in this opinion as it discusses the defendants' various contentions on appeal.

I. Government's Use of Gregory's Bankruptcy Testimony

On June 19, 1978, after all the events which gave rise to the criminal charges, the Gregorys filed for relief under Chapter XII of the Bankruptcy Act. Other corporations owned principally by the Gregorys filed for relief under Chapter XI. At the first meeting of creditors, on July 26, 1978, the Gregorys testified individually and as representatives of the corporations. They requested and were granted immunity under 18 U.S.C.A. Section 6002, which provides that no such testimony "or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case," with inapplicable exception. 11 U.S.C.A. Section 344, formerly 11

U.S.C.A. Section 25(a)(10).[1]

The FBI and FDIC were actively investigating the Gregorys in anticipation of criminal proceedings when the bankruptcy meeting took place.

The testimony concerned the finances of the Gregorys and their corporations. FDIC personnel, along with representatives of 23 other creditors, attended the meeting.

Before trial, the defendants moved to dismiss the indictment, claiming that prosecution of the case had been tainted by the Government's exposure to immunized testimony given by the Gregorys at the

---

[1] Section 11 U.S.C.A. Section 344, formerly section 7(a)(10) of the Bankruptcy Act, 11 U.S.C.A. Section 25(a)(10), provides:

> Immunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of title 18.
>
> Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2565.

Section 6002 of Title 18 provides for immunity in court compelled testimony.

creditors' meeting. The trial court denied this motion on March 5, 1982, after a hearing. On appeal, the defendants ask this Court to vacate their convictions and render a judgment dismissing the indictment, arguing (1) the trial judge improperly shifted to them the burden of proving that the immunized testimony was used, and (2) the immunized testimony was used in the investigation and prosecution of the case.

The allocation of the burden of proof where a defendant claims the Government is attempting to improperly use immunized testimony was set forth in Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) which held that:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate sources for the disputed evidence.

378 U.S. at 79 n. 18, 84 S.Ct. at 1609 n.

18. This was reaffirmed in Kastigar v. United States, 406 U.S. 441, 460, 92 S.Ct. 1653, 1664, 32 L.Ed.2d 212 (1972), where the Supreme Court further observed that this burden "is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460, 92 S.Ct. at 1664.

[1, 2] The Gregorys contend that the district court placed a greater threshold burden on them than that required by Kastigar and its progeny by requiring them to "point out specifically--testimony that [they] gave that wa subject to immunity, and how that testimony, and where that testimony, subsequent shows up... or... was presented to the Grand Jury or came to the attention of the Grand Jury." The court proceeding to require the Government to

establish a legitimate, independent source for each of the items identified by the defendants. Our review of the testimony below indicates that the Government met its burden as to those items.[2]

---

[2] The Gregorys' objections to evidence they claimed the Government had derived from immunized testimony, and the Government's responses as to the sources of the testimony, are as follows:

1. Branum's testimony about loans to McCollister and Don.

Response: Sources for investigation were record reviews conducted before July 26, 1978.

2. Liggon's testimony.

Response: Sources were record reviews in April, 1978, and leads from those reviews.

3. Whitehead's testimony.

Response: Sources was a review of the Bank's files in April, 1978.

4. Parrent's testimony about Gregory loans and participation at the Bank of East Alabama.

Response: Source was a review of records at the Bank of East Alabama in April, 1978.

5. Don's testimony.

Mayfield's testimony about inter-corporate transfers.

McCollister's testimony.

Mrs. Gregory's testimony during cross-examination about Don loan and Mississippi Bank.

Response: Sources were interviews and

(Footnote 2 continued on following page)

(Footnote 2 continued):
record reviews conducted before July 26, 1978.

The Government thus demonstrated independent, legitimate sources for the specific items at trial allegedly derived from the immunized testimony.

To show the immunized testimony had not been used as an investigatory lead, the Government pointed to these sources for information contained in the immunized testimony:

1. Immunized testimony about Charles Whitehead (loan recipient).

Response: Source was a review made on April 10, 1978 of the records of the Bank's commercial loans.

2. Immunized testimony about ALM, Inc., the sale of the Sheraton and distribution of sale proceeds.

Response: Source was April 10, 1978 review of the Bank's commercial loans, which led to a review of other ALM-related documents.

3. Immunized testimony about intercorporate loans and transfers of assets.

Response: Source was an FDIC review of Gregory-related checking accounts at various banks prior to July 26, 1978.

4. Immunized testimony about judgments obtained by the FDIC against the Gregorys and their corporations.

Response: The FDIC knew of these judgments independently of the immunized testimony.

5. Immunized testimony about commissions received from Centennial Life Insurance Company.

Response: Source was a review on April 13, 1978 of expenses paid by the Bank to the Gregorys and related companies.

Government witnesses also testified
(Footnote 2 continued on following page)

We affirm the holding of the district court in all respects as to the evidence considered.

By limiting the evidentiary materials thus identified for examination for taint at the outset, however, the court relieved the Government of a portions of its "heavy burden of proving that all of the evidence it [used] was derived from legitmate independent sources." 406 U.S. at 461-62, 92 S.Ct. at 4665-66.

[3] Section 6002 speaks to use of the immunized testimony against the witness in

---

(Footnote 2 continued):

that the Gregory's immunized testimony was not used.

In light of the Government's (1) independent sources for the evidence presented at trial, (2) independent sources for the information revealed in the immunized testimony, and (3) witnesses who testified that the immunized testimony had not been used in the investigation the trial court's conlcusion that the Government showed independent, legitimate sources for evidence claimed by the Gregorys to be improperly tainted was not clearly erroneous.

"any criminal case," and thus prohibits its use in the grand jury proceedings as well as at trial. United States v. Beery, 678 F.2d 856, 860 (10th Cir. 1982); United States v. Hinton, 543 F.2d 1002, 1009 (2d Cir. 1976), cert. denied, 430 U.S. 982, 97 S.Ct. 1677, 52 L.Ed.2d 376 (1977); United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). The defendants could not be presumed to have knowledge of all of the evidence presented to the grand jury or employed in the Government's investigation. Under such circumstances, a ruling only on those items identified by the defendants is not sufficient. No cases have been cited to this Court in which the procedure employed by the district court in this case was followed, and we find no support for affirmance of that practice in light of Kastigar, and this Court's application of Kastigar in United States v. Seiffert, 463

F.2d 1089 (5th Cir. 1972). On the contrary, in Seiffert, this Court remanded in order that the Government might "show how it acquired all of the evidence admitted below." 463 F.2d at 1092 (emphasis added). In the case before us remand is necessary for the limited purpose of allowing the district court to ascertain whether the portions of the Government's evidence at trial not challenged by the Gregorys and the evidence before the grand jury, not formerly considered by the district court, were in fact "derived from a legitmate source wholly independent of the compelled testimony." Kastigar, 406 U.S. at 460, 92 S.Ct. 1664. If the Government can affirmatively make such a showing, the Gregorys' convictions must stand. If the evidence presented to the grand jury and at trial is not found to have been properly derived from legitimate independent sources, then the indictment must be dismissed or a new trial ordered,

depending on whether the Government fails to prove independent sources for its grand jury evidence, or only for its trial evidence, unless the error is held harmless beyond a reasonable doubt. If the Government sustains its burden of proof, or if use of the prohibited evidence is found to be harmless, then the convictions should be reinstated. See United States v. Beery, 678 F.2d at 863.

II. Jury Selection Act

Defendants contend the indictment should have been dismissed because the procedures attending the selection of the grand jury that indicted them did not comply with certain procedural requirements of the Jury Selection Act of 1968, 28 U.S.C.A. Sections 1861-1869, and the Local Plan (Plan of the United States District Court for the Southern District of Alabama for the Random Selection of Grand and Petit Jurors).

Defendants moved to dismiss the indictment and submitted nine affidavits. The affidavits focused on conversations with the district court clerk to the effect that the clerk (1) had not prepared the alphabetical list of names taken from the master jury wheel; (2) had not executed affidavits indicating he had verified the accuracy of the county voter registration lists used to construct the master jury wheel but had performed spot checks to verify those voter registration lists; (3) did not possess the certificate of the appropriate Mobile County official indicating that all registered voters had been considered in the selection process; (4) did not possess a document verifying that his March 27, 1979, order to the Mobile Data Center to produce 70 names for a grand jury venire was carried out as the order specified; (5) did not systematically process completed juror qualification forms;

and (6) did not retain the 1976 Mobile County voter registration list, which was one source of data used to construct the master jury wheel, and it could not be reproduced.

The district court assumed the nine affidavits accompanying the motion to be true, but rejected defendants' claim that the ommissions amounted to a "substantial" failure to comply with the Act: "All of the defects which the defendants point to are technical deviations from the Act and the local plan..."

This Court recently construed the Jury Selection and Service Act in United States v. Bearden, 659 F.2d 590 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982). In Bearden, the clerk had violated the Act or local plan by selecting the starting number arbitrarily rather than randomly, by failing to post public notices of selection procedures, and

by improperly excusing or disqualifying individuals from qualified jury wheels, and by granting permanent rather than temporary excusals to persons summoned for jury service. The court held that none of these violations constituted a "substantial" failure to comply with the Act or local plan.

[4, 5] We held that the alleged violations must be weighed against the underlying principles of the Act. A substantial violations of the Act will be found only when two important general principles are frustrated: (1) random selection of juror names and (2) use of objective criteria for determination of disqualifications, excuses, exemptions, and exclusions. Mere "technical" deviations from the Act or even a number of them are insufficient if they do not frustrate the obtaining of jury lists that represent a cross section of the relevant community and

do not result in impermissible forms of discrimination and arbitrariness.

[6-9] Defendants contend that the acts of noncompliance in this case frustrated the goal of random selection of jurors in that Mobile County was overrepresented in the grand jury that indicted them. This apparent geographical disparity did not result in a substantial failure to comply with the Act. First, it is the master jury wheel, not the actual grand jury, which must be geographically proportional. Under the Act, the local plan "shall ensure that each county, parish, or similar political subdivision within the district...is substantially proportionally represented in the master jury wheel for that judicial district:" 28 U.S.C.A. Section 1863(b)(3). Second, the grand jury venire in this case, comprising 70 individuals, was substantially proportional geographically. Although residents of Mobile County were the most

numerous on the venire, Mobile County is clearly the most populous county in the district. A Party claiming disproportionate representation of a particular group in a jury selection process must show a substantial disparity between that group's representation in the general population. See, e.g. United States v. Brummitt, 665 F.2d 521, 528-30 (5th Cir. 1981) (Hispanic Americans), cert. denied, 456 U.S. 977, 102 S.Ct. 2244, 72 L.Ed.2d 852 (1982); United States v. Hawkins, 661 F.2d 436, 442-43 (5th Cir. Unit B 1981) (residents of divisions within judicial district), cert. denied, 456 U.S. 991, 102 S.Ct. 2274, 2967, 73 L.Ed.2d 1287 (1982); United States v. Goff, 509 F.2d 825, 826-27 (5th Cir.) (blacks and indigents), cert, denied, 423 U.S. 857, 96 S.Ct. 109, 46 L.Ed.2d 83 (1975). The counties in this case were "substantially proportionally represented". 28 U.S.C.A. Section 1863(b)(3). Venires or grand juries

need not reflect county populations exactly. See United States v. Hawkins, 661 F.2d at 442-43.

[10] The Court noted in Bearden, "Congress did not intend for 'random selection' under the Act to be defined as 'statistical randomness'..." 659 F.2d at 602. "It is sufficient for the purpose of this legislation if the plan adopts some system of selection that affords no room for impermissible discrimination against individuals or groups." S.Rep. No. 891, 90th Cong., 1st Sess. 16 n. 9 (1967), U.S.Code Cong. & Admin.News 1968, p. 1792, quoted in Bearden, 659 F.2d at 602. While the methods used here may have resulted in venires that were not statistically random, there has been no showing that they resulted in discriminatory selection of jurors or otherwise prevented jury panels from consisting of fair cross-sections of the community.

[11] The failure to prepare an alphabetical list of names drawn from the master jury wheel (28 U.S.C.A. 1864(a); Local Plan pp. 7-8), the names that formed the tentative qualified jury wheel, had no impact on the names drawn from the master jury wheel. The people whose names were selected if not exempted, excused, or disqualified, were placed on the qualified jury wheel. Whether the qualified wheel was arranged alphabetically was immaterial to random selection, for the selection of names from that wheel to construct venires was done by computer according to a random formula. The failure to prepare the alphabetical list, to the extent it affected the process, affected all counties and potential jurors equally, and was not a substantial violation of the Act. See United States v. Evans, 526 F.2d 701, 705-06 (5th Cir. 1976)(no substantial violation of Act where alphabetical lists and Jury

Selection Report were not prepared).

The nonexistence of the alphabetical list made it impossible for the clerk to enter notations concerning exemption, excusal, or disqualification next to the names of those excluded from service. This was also technical violation which did not give rise to impermissible discrimination. Although the clerk failed to verify county voter registration lists, there is no allegation that the clerk's "spot checks" of these lists were discriminatory, either by design or by effect. The failure to possess (1) a certificate of a Mobile County official indicating that all registered voters had been considered in the selection process, (2) a document verifying precise compliance with the March 27, 1979, order to the Mobile Data Center for a 70-person venire, and (3) the 1976 Mobile County voter registration list, absent any proof of underlying substantive irregularities, was

also a purely technical violation of the Act and Local Plan.

Because the procedure in this case did not result in a "substantial failure to comply with the Act", or otherwise prevent jury panels from consisting of fair cross-sections of the community, we affirm the district court's refusal to dismiss the indictment on this basis.

III. Sufficiency of the Evidence

[12] All of the defendants claim the evidence was insufficient to support their convictions. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the Government, and make all reasonable inferences in support of the jury verdict. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Davis, 679 F.2d 845, 852 (11th Cir. 1982), cert. denied, -- U.S. ---, 103 S.Ct. 11198, 75 L.Ed.2d 441 (1983).

A. The Gregorys

Conspiracy to Misapply Bank Funds

The conspiracy alleged in this case involved various transactions between the Bank and the Gregorys, their corporations, and their friends and associates during the time the Gregorys owned a controlling interest in the Bank. The evidence of these transactions presented by the Government is summarized as follows:

1. Participation in Loans

On February 7, 1976, the Bank purchased participations in loans of $498,741.98 from the Bank of East Alabama. That bank had lent the Gregorys and their corporations $676,500 in 1975 and $993,500 in 1976, including a $150,000 loan to Atkinson, secured by the Bank stock. The minutes of the directors' meetings do not show that the Gregorys revealed their connection with Bank of East Alabama to the

Board.

2. Correspondent Banking Relationships

The Bank opened correspondent accounts with

(a) Southern National Bank of Birmingham on 11-11-75. It had lent Mrs. Gregory $350,000 the day before, taking a security interest in the Bank stock.

(b) First Bank of Macon an Chilton County Bank on 11-11-75. Both were Gregory-controlled banks.

(c) Charter National Bank on 3-22-76. Mrs. Gregory had borrowed $55,000 there in February, and aggregate Gregory borrowings there since 1972 exceeded $2 million.

(d) First National Bank of Pensacola on 4-8-77. The Gregorys had $500,000 loans outstanding there.

(e) Mississippi Bank on 4-8-77. The Gregorys had $250,000 in outstanding loans.

3. Purchase of Goods and Services from the Gregorys and their corporations

(a) The Bank paid $15,000 to Gregory-owned Faith Investment Company (Gregory owned) for "Customer Appreciation Day", a country and western show.

(b) The show was catered by Sea Ranch Restaurant (Gregory-owned).

(c) Stationery, supplies and a $2500 flag pole were purchased from Faith Investment Co.

(d) Gregory Motors leased a car and a sign to the Bank.

(e) The Bank paid Gregorys $25,000 for private plane travel from January through August of 1976.

(f) The Bank paid Gregory $50,000 for property he had purchased for $25,000 one year earlier, and which he had leased to the bank at $325 per month.

4. Loans to Out-of-Territory

Associates of Gregory

(a) Gregory arranged for Norman DeWeese to borrow money in order to purchase stock in Gregory companies.

(b) On April 8, 1977, Gregory arranged for a $25,000 unsecured loan for Bill Agall, his in-house accountant. Gregory later purchased Bank stock from Agall.

(c) Also on April 8, 1977, Gregory made arrangements for a $25,000 unsecured loan to Tom Mayfield, his comptroller. When Mayfield and his wife had borrowed $7,500 from the Bank only a week earlier, it required that he pledge home furnishings, appliances and a car as collateral.

(d) In December, 1976, the Gregorys arranged for Charles Whitehead to borrow $100,000 from the Bank for 3 months. Whitehead was prepared to pay the loan off when Gregory borrowed $100,000 from Whitehead, assuring him that his Bank note

would be renewed, which it was.

(e) On March 30, 1977, Dr. Don, Spurlock's father-in-law, borrowed $25,000 from the bank. Don testified before the grand jury that in April, 1977, he loaned $25,000 to a Gregory corporation. Also in April, 1977, at Gregory's suggestion, Don borrowed $150,000 from the Bank and purchased a certificate of deposit at the Mississippi Bank. In October 1977, Don arranged for Spurlock to cash in the certificate and loan the proceeds to Gregory Motors.

(f) On June 17, 1977, Rolphe McCollister of Baton Rouge borrowed $100,000 from the Bank. Gregory knew the Bank had made the loan. Two weeks later the Gregorys borrowed $100,000 from McCollister.

5. Loans to the Gregorys

(a) By February of 1977, Mr. and Mrs. Gregory each had loans totalling

$226,000 from the Bank which equalled the legal lending limit for each of them. They had been aware since the summer of 1976 that both the State Banking Department and FDIC did not think they were entitled to separate lines of credit because they had not demonstrated the ability to individually service their debts. As of February, 1977, their loans represented 99.4% of the Bank's capital structure.

[13] The Gregorys claim that because the participations, correspondent accounts, expenses payments and loans were approved by the Board of Directors, there was no misapplication of bank funds under 18 U.S. C.A. Section 656. While the valid consent of the Board of Directors is a defense to misapplication, the Board cannot validate a fraud on the bank. United States v. Salinas, 654 F.2d 319, 328 (5th Cir.1981) overruled in part on other ground, United States v. Adamson, 700 F.2d 953 (5th Cir.

Unit B 1983); United States v. Beran, 546 F.2d 1316, 1321 (8th Cir. 1976). Thus, if the coconspirators had an intent to defraud, "approval of the board of directors is no longer material to whether there was a misapplication of bank funds." Salinas, 654 F.2d at 328 (quoting Beran, 546 F.2d at 1321).

[14] The intent of the conspirators is a question of fact for the jury, and the jury in this case found a specific intent to injure and defraud the bank. That the directors may have reviewed the transactions at some point does not absolve the coconspirators from culpability for misapplication of the bank's funds, particularly here where the evidence showed that the Gregorys were the moving force behind many of the Board's actions.

[15] We recognize that this is an unusual case, in that the Gregorys' intent to injure the bank cannot be directly proven

through actions which were against bank rules or outside their authority. There was sufficient evidence of their intent, however, from the knowing, voluntary actions of the Gregorys which tended to injure the bank. See United States v. Adamson, 700 F.2d 953, 965 (5th Cir. Unit B 1983)(the appropriate mens rea standard for Section 656 is knowledge); United States vs. Southers, 583 F.2d 1302 (5th Cir. 1978). In addition, there was testimony to the effect the (1) the bank president was required to call Gregory every day, (2) loan officers could not loan more than $45,000 without Gregory's approval, (3) the Board was not informed, in establishing correspondent accounts, of the extent of the Gregorys' dealings with the proposed correspondent banks, (4) the Board was not informed that the State Banking Department disapproved of separate lines of credit for each of the Gregorys, and (5) the Board was not informed that

Faith Investment Company was to receive a commission from the country and western show. Although some of this testimony was disputed, there was sufficient evidence from this testimony and the Gregorys' actions to allow the jury to conclude that they knowingly participated in fraudulent transactions.

Specific Counts of Misapplication

Aside from the conspiracy count, the Gregorys were convicted of eight counts of misapplication of bank funds involving loans made by the Bank to Gregory-owned corporations after April 8, 1977, when the Gregorys sold their stock in the bank to Mr. and Mrs. Mark Lyons, III.

The Gregorys argue that there was insufficient evidence to show that after April 8, 1977, they maintained a "connection" with the bank as requred by 18 U.S.C.A. Section 656, which provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank, or insured bank... embezzles, abstracts, purlions or willfully misapplies any of the moneys, funds or credits or such bank... shall be fined not more than $5,000 or imprisoned not more than five years, or both...

18 U.S.C.A. Section 656 (emphasis added).

The statute does not define those who are "connected" with the bank. The Government argues that the Gregorys were "connected" within the meaning of Section 656 in three ways. First, in the sale of stock to Lyons, the Gregorys received a promissory note from Lyons calling for 360 monthly payments of $8,834.94 each, and granting a security interest in 31,000 shares of stock. Lyons was thus obligated to pay the Gregorys over $8,000 per month, and he defaulted on this obligation in less than a year. Second, in the sale, the Gregorys retained voting rights in the 31,000 shares of stock on any matter

affecting capitalization of the bank. Third, the bank had a heavy concentration of loans to the Gregorys.

Although these precise "connections" with a bank have not been previously considered, similar "connections" have placed defendants within the ambit of Section 656. In Garrett v United States, 396 F.2d 489 (5th Cir.) cert. denied, 393 U.S. 952, 89 S.Ct. 374, 21 L.Ed.2d 364 (1968), the Court held that defendants who had purchased a controlling interest in the bank, directed that it be placed in the name of their corporation and in the name of an associate, and caused four of their employees and associates to be elected to the seven-member board of directors, were "connected" with the bank for purposes of Section 656. The Court noted that the defendants had been active in bank affairs in securing the purchase of mortgages and in increasing the bank's deposits. See also

United States v. Fulton, 640 F.2d 1104 (9th Cir. 1981) (employee of bank's wholly owned subsidiary mortgage company); United States v. Edick, 432 F.2d 350 (4th Cir. 1970) (department manager in the subsidiary of a holding company which held a controlling interest in the bank).

[16] Thus, there was sufficient evidence from the jury to conclude that the Gregorys were "connected" within the contemplation of the statute. In addition, the evidence supported a conviction under the theory that the Gregorys aided and abetted Lyons, an officer, director and majority stockholder, in misapplying bank funds. The jury could have inferred that Lyons allowed the bank to extend loans to the Gregory corporations because of his personal debt to the Gregorys.

B. Atkinson

G. W. Atkinson argues the evidence is insufficient to support his convictions for

conspiracy and six counts of misapplication of bank funds. While the Gregorys held a controlling interest in the Bank, Atkinson became the Secretary to the Board of Directors in August, 1976, and a Vice-President of the Bank in November, 1976. He worked at Faith Investment Company in Pensacola.

[17] Although Atkinson claims he exerted no control over the Bank's decisions, the evidence showed that he generally managed the day-to-day affairs of the Bank. His position clearly gave him knowledge of, and participation in, the actions of the Gregorys during their control of the Bank. In addition, Atkinson received a $150,000 loan from the Bank of East Alabama before the Bank purchased participations in loans from that bank. On April 5, 1977, Atkinson borrowed $50,000 unsecured from the Bank. He already had $255,000 in outstanding debts at that time.

The evidence was sufficient to connect Atkinson to the conspiracy.

Regarding the substantive misapplication counts, Atkinson signed notes for some of the loans from the Bank to Gregory corporations totalling $714,000 in the month following the bank sale. Atkinson testified that he had no hesitation signing these loans as a corporate officer although he was aware of the FDIC warnings about concentrations of credit with the Gregorys. Despite Atkinson's argument that he intended only to make legal loans, the jury could infer from his actions that he intentionally aided in the misapplication of bank funds.

C. Spurlock

Spurlock challenges the evidence supporting his conspiracy conviction. Spurlock was hired by Gregory at the Chilton County Bank in April, 1975, and was transferred to the Bank in March, 1976 as Vice-President. He held both of these

positions until April 8, 1977, when the Gregorys sold their controlling interest in the Bank.

Spurlock's part in the alleged conspiracy occurred shortly before the Gregorys sold their stock in the Bank. The Bank made a loan to Spurlock's father-in-law, Dr. Horace Don, on March 30, 1977. Spurlock approved the $150,000 loan to Don as a member of the Board of Directors, and signed the cashier's check as an officer of the Bank. Don testified that in April, at Gregory's suggestion, Don purchased a certificate of deposit at the Bank of Mississippi. In October, Gregory sent Spurlock to Iowa to visit Don. Don gave Spurlock a sealed letter, and told him to take it to the Mississippi Bank in Jackson, Mississippi, where Spurlock would get a check in his name. Don told Spurlock to take this check to Gregory. Spurlock received the check, took it to Pensacola,

endorsed it, and gave it to Gregory. It thus appears that Gregory received some benefit from the loan to Spurlock's father-in-law.

[18] Although Spurlock testified that he did not know about the Mississippi certificate of deposit, the question of Spurlock's intent is one for the jury. Although the evidence against Spurlock is not overwhelming, the evidence that Spurlock went to Mississippi, received the check and transmitted the funds was sufficient for the jury to infer that Spurlock was a knowing participant in a scheme to misapply bank funds.

IV. Evidentiary Rulings

A. Cease and Desist Order

[19] Contrary to defendants' contention, the trial court's admission of a temporary cease and desist order entered by the FDIC was not an abuse of discretion.

First, it was issued within the time

frame in the indictment, and was part of the general background of the controversy between the Gregorys and the FDIC. Second, part of the Gregorys' defense was that their financial affairs crumbled when the FDIC cut off their credit by cease and desist orders which prevented them from borrowing funds. The Government introduced the order to show that it did not prohibit the Gregorys from borrowing from other banks with which they had no connection, and therefore did not cause their ruin. Third, the order, issued on May 11, 1977, was relevant because it was issued the day after the last loan by the Bank to a Gregory corporation. The jury could infer from this that additional loans would have been made if the order had not prohibited them. Fourth, the prosecution contended that because the Gregorys had to be consulted about the order, even after their bank stock had been sold, this showed a "connection" with the bank under 18

U.S.C.A. Section 656.

The defense referred to the order in its closing argument, arguing that it required the Gregorys to withdraw their deposits from the Bank, and that certain loans should not be considered criminal acts because the order did not prohibit their renewal.

Arguing that the order should not have been admitted, defendants rely primarily on United States v. Christo, 614 F.2d 486 (5th Cir. 1980). The Christo, the Government attempted to introduce certain cease and desist orders issued by the Comptroller of the Currency against a bank. The orders were issued subsequent to the dates of crimes charged in the indictment. Although the orders were not admitted into evidence, the prosecutor referred to them a number of times before the jury. The Court stated:

> Standing alone, the prejudicial effect of these orders on the jury

> would require reversal. In the event government counsel desires to use Cease and Desist Orders in its case, the trial court should conduct a hearing, outside the presence of the jury, to determine the relevance, if any, of these orders an weigh that relevance against their highly prejudicial nature.

614 F.2d at 495. Unlike the orders in Christo, the order in this case was relevant to a number of issues in the case, and this probative value outweighed any prejudicial effect of the order. The trial judge did consider the order's relevance in chambers with the attorneys. The court did not abuse its discretion in admitting the cease and desist orders.

B. Check Kite

Before calling two bankers as defense witnesses to prove the Gregory's creditworthiness, defendants moved to limit cross-examination of those witnesses about a check kite between the two banks. The court ruled that if the defense introduced the testimony of the two bankers to show that

the Gregorys had excellent credit and bank relations, that would open the door to proof of the check kite, both to show problems in bank relations and to show that the Gregorys had cash flow problems.

The defense called one of the bankers and introduced testimony about the Gregorys' credit and repayment history. The defense also presented testimony from Vonna Jo Gregory that the Gregorys had never had a check returned from accounts at the two banks.

In their rebuttal to the defense case, the Government started to prove the check kite. One of the bankers was recalled to produce documents, and an FDIC examiner testified about the excessive use of uncollected funds in the 21 Gregory accounts at one of the banks. The court then reversed its ruling on the admissibility of the evidence, reasoning that although the defense had opened the door to the evidence

and it was relevant, because the evidence of the check kite was lengthy and would be fresh in the jury's mind at the end of the case, it would cause prejudice and delay outweighing its probative value. The court then instructed the jury to disregard the evidence.

[20] There was no abuse of discretion in the trial court's admission and later exclusion of the evidence of the check kite. At the time the evidence was excluded, the jury had heard the banker's testimony that the Gregorys were not conducting a check kite. The FDIC examiner had not given his opinion. The court's instruction to the jury to disregard the evidence cured any prejudice.

C. Evidence of Gregorys' Credit and Employment History

[21] The Gregorys claim the trial court erred in excluding evidence of their prior credit and employment history. They

were not allowed to introduce (1) evidence that they borrowed over a million dollars in 1971 and repaid it on schedule, (2) their credit history over the course of their business careers, (3) their credit standing in 1974, (4) two letters from bankers concerning their creditworthiness, or (5) evidence that Mrs. Gregory had worked all her adult like. The excluded evidence was crucial to the Gregorys' defense, they argue, because it showed their intent to repay the money borrowed from the Bank.

This evidence, if relevant to the defense, was cumulative. Both of the Gregorys testified about their background and employment history. The court admitted evidence of numerous loans made to the Gregorys, along with evidence that they were not late on any loan payments until 1978. In light of all the evidence concerning their credit history, the exclusions by the trial court were well within its discretion.

V. Severance

Defendants claim that the Gregorys, Spurlock and Atkinson should have had separate trials. The Gregorys filed a motion for relief from prejudicial joinder on June 30, 1980, and the motion was adopted by Spurlock and Atkinson. In the motion, the Gregorys alleged that if severed, Spurlock and Atkinson would give testimony beneficial to the Gregorys. The motion to sever was carried with the case, but at the beginning of trial it was not called to new trial judge's attention. All the defendants were tried together.

[22, 23] To warrant reversal of a conviction for abuse of discretion in the decision whether to sever, the appellant bears the burden of showing "specific and compelling prejudice." United States v. Hewitt, 663 F.2d 1381, 1388-89 (11th Cir. 1981). The Gregorys have made no such showing here.

Atkinson and Spurlock claim they were prejudiced by the evidence of the Cease and Desist Order and the Gregorys' check kite. It is not clear that the trial court was presented with this ground for severance. The record indicates the defendants moved for a mistrial, not for a severance, concerning the evidence of the Cease and Desist Order. Spurlock and Atkinson adopted the Gregorys' motion in limine concerning the check kite, but did not move for a severance.

On several occasions, the trial court instructed the jury not to consider evidence against a particular defendant unless it pertained to that defendant. The check kite clearly pertained only to the Gregorys. The Cease and Desist Order was relevant to the prosecution of the bank officials in the same way it was relevant to the Gregorys' case. Under these circumstances, Atkinson and Spurlock have shown no specific and

compelling prejudice based on the introduction of this evidence at their trial.

VI. Motions for Acquittal and New Trial

The trial court refused to consider the merits of motions for acquittal and for a new trial on the ground they were too late and the court lacked jurisdiction.

The time for moving for acquittal and new trial is governed by Fed.R.Crim.P. 29(c) and 33. Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or with such further time as the court may fix during the 7-day period..." Under Rule 33, a motion for new trial, based on grounds other than newly discovered evidence, "shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." The jury returned a verdict

of guilty in this case on April 5, 1982. The defendants' written motions for judgment of acquittal and for a new trial were not filed until April 26, 1982. Although this was not within the 7-day period following April 5, defendants contend the motions were timely because they were made "within such further time as the court may fix during the 7-day period." William J. Baxley, the attorney for the Gregorys, filed an affidavit stating that on April 8, 1982, the district court orally granted an extension of time allowing the defendants until April 26, 1982 to file their motions for acquittal and new trial. "There was absolutely no equivocation nor contingencies and I was distinctly told by the Court that we would have until April 26, 1982, to file our motions..."

Apparently a written motion for extension of time was filed with the clerk of the district court in Mobile, Alabama, on

April 8, 1982, but the trial judge did not receive the motion until April 14. The court entered a written order denying the extensions on April 15, 1982. On April 29, 1982, the court denied a motion to reconsider the extension, and the April 26, motions for acquittal and new trial, stating that it had "no jurisdiction of this matter, the time for consideration of the motions having lapsed."

[24] If the trial court orally granted the extension of time within the 7-day period, as represented in the Baxley affidavit, it did not lose jurisdiction over the motion merely because its ruling was not reduced to writing with the 7-day period. Therefore, if the extension was orally granted, the court should have considered the April 26 motions on the merits. Rather than remand the case, however, we have examined the record and determined that the court could not have granted either motion without

going outside the bounds of discretion given it in such matters. The denial on jurisdictional grounds was therefore harmless error.

[25, 26] In considering a motion for judgment of acquittal, the evidence must be considered in the light most favorable to the Government, together with all inferences reasonablly drawn from the facts, to determine whether there is substantial evidence from which a jury could reasonably find the defendants guilty beyond a reasonable doubt. United States v. Martinez, 486 F.2d 15 (5th Cir.1973). Because the evidence is sufficient to sustain the convictions in this case, see Part III, supra, it would have been improper for the trial court to grant the defendants' motions for judgments of acquittal.

[27] The grant or denial of a motion for new trial rests in the sound discretion

of the trial court. United States v. Riley, 544 F.2d 237 (5th Cir. 1976), cert. denied, 430 U.S. 932, 97 S.Ct. 1554, 51 L.Ed.2d 777 (1977). Although this standard provides some latitude for the district court to either grant or deny a new trial without meriting reversal on appeal, any grant of a new trial on the grounds asserted in this case would not withstand review under the abuse of discretion standard. Most of the grounds for new trial set forth in the defendants' motion have been addressed on this appeal, and the other grounds asserted are without merit. Remand to the trial court for consideration of the motion for acquittal or new trial is therefore unnecessary.

AFFIRMED IN PART and VACATED and REMANDED IN PART WITH DIRECTIONS.

Office-Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-520

In the Supreme Court of the United States

OCTOBER TERM, 1984

E.A. GREGORY AND VONNA JO GREGORY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MPP

TABLE OF AUTHORITIES

Page

Cases:

Grand Jury, In re, 524 F.2d 209, cert. denied, 425 U.S. 927 5

Kastigar v. *United States*, 406 U.S. 441 4

United States v. *Blue*, 384 U.S. 251 5

United States v. *McDaniel*, 482 F.2d 305 5

United States v. *Pantone*, 634 F.2d 716 5

United States v. *Seiffert*, 463 F.2d 1089 3

Statutes:

Bankruptcy Reform Act of 1978, 11 U.S.C. 344 .. 2

18 U.S.C. 371 1

18 U.S.C. 656 1

18 U.S.C. 6002 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-520

E.A. GREGORY AND VONNA JO GREGORY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government, both before the grand jury and at trial, utilized evidence tainted by their prior immunized testimony in a bankruptcy proceeding.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted on one count of conspiracy to misapply bank funds, make false statements, and commit wire fraud, in violation of 18 U.S.C. 371, and on eight counts of misapplication of bank funds, in violation of 18 U.S.C. 656.[1] Petitioner E.A. Gregory was sentenced to concurrent two-year terms of imprisonment on each count. His wife, petitioner Vonna Jo Gregory, was sentenced to concurrent

[1]Two co-defendants, G.W. Atkinson and Robert Spurlock, were convicted on the conspiracy count. Atkinson was also convicted on six of the substantive counts. Spurlock's certiorari petition, which raises an issue unrelated to the instant petition, is pending before the Court in No. 84-542.

three-year terms of probation on each count. The court of appeals affirmed in part but remanded for a further evidentiary hearing to establish whether the government's proof had been derived entirely from sources independent of petitioners' immunized testimony. Pet. App. 1B-67B; 730 F.2d 692.

The pertinent facts are set out in the opinion of the court of appeals (Pet. App. 17B-22B). Briefly stated, in November 1975 petitioners purchased a controlling interest in the Bank of Camden (Alabama), which was renamed the Wilcox County Bank. Both petitioners were on the board of directors, and petitioner E.A. Gregory was chairman of the board. While they controlled the bank, petitioners, aided by their co-conspirators, engaged in various forms of self-dealing at the bank's expense. The substantive counts against petitioners related to a series of loans made by the bank to corporations owned by petitioners in the month following petitioners' sale of their bank stock. The loans totalled $864,000 and were made in April and May 1977.

Petitioners and their corporation sought relief from their creditors under the Bankruptcy Act. Five weeks later, petitioners met with their creditors. Pursuant to 11 U.S.C. 344, they requested and were granted immunity under 18 U.S.C. 6002 covering their testimony in the bankruptcy proceedings. At the time of the bankruptcy proceedings, the FBI and the Federal Deposit Insurance Corporation (FDIC) were investigating petitioners for possible criminal violations. FDIC personnel, along with representatives of some 23 creditors, attended the meetings at which petitioners gave their immunized testimony.

Prior to their criminal trial, petitioners moved to dismiss the indictment on the ground that it was tainted by the prior immunized testimony. The district court required petitioners to cite specific immunized testimony and to state how

that testimony affected the government's case. As to each item cited by petitioners, the government demonstrated that it had an independent source for its proof. The district court then denied the motion to dismiss. See Pet. App. 1A-3A.

2. On appeal from petitioners' convictions, the court of appeals affirmed in part but remanded the case for a further hearing on the issue of whether the immunized testimony had tainted the proceedings. The court of appeals found that the district court had erred in placing on petitioners the burden of going forward to challenge specific items of the government's proof (Pet. App. 20B-29B). Rather, the court concluded, it was the government's burden to " 'show how it acquired all of the evidence admitted below.' " *Id.* at 28B, quoting *United States* v. *Seiffert*, 463 F.2d 1089, 1092 (5th Cir. 1972). The district court was directed to dismiss the indictment unless the government could establish an independent source for all of the evidence presented to the grand jury. A new trial was to be ordered if the government was unable to establish an independent source for all of its trial proof. Pet. App. 28B-29B. The court of appeals upheld the district court's finding that an independent source had been established for the items originally proffered by petitioners at the district court's direction. *Id.* at 24B & n.2.

3. Petitioners seek review on three grounds relating to the district court's rulings on whether their immunized testimony tainted the proceedings. First, they allege that the district court, in finding that there was no taint with respect to the evidence considered by the grand jury, improperly speculated that independent sources would have led the government to that proof (Pet. 21-24). Second, petitioners argue that the district court misstated the law in ruling that the prosecution may have access to and may have studied immunized testimony without necessarily having used that testimony (Pet. 24-28). Third, they contend that the

government's investigation following the bankruptcy proceedings must have drawn upon various aspects of the immunized testimony (Pet. 29-38). All of these complaints relate to the investigatory and grand jury phases of the proceedings below.

Petitioners' claims are not presently ripe for review by this Court. On remand the government must discharge its "heavy burden" of establishing that all its grand jury proof and all its trial proof not previously examined was produced from sources wholly independent of petitioners' immunized testimony. *Kastigar* v. *United States*, 406 U.S. 441, 461-462 (1972). As yet there has been no determination of taint regarding the government's evidence presented to the grand jury. Thus, at a future hearing, the district court may determine that some or all of the government's evidence was tainted and, accordingly, may dismiss the indictment or order a new trial. On the other hand, if the court finds that the government has satisfactorily shown that all of its evidence was derived from a source wholly independent of petitioners' immunized testimony — as the courts have already done with respect to ten categories of trial evidence[2] — then petitioners may seek review of that determination in an appeal after remand. It is obviously premature, however, for this Court to address petitioners' complaints regarding the grand jury proceedings until after

---

[2]As to the ten specific categories of trial evidence, the government affirmatively demonstrated that knowledge of each item was derived from a source before and independent of the hearing at which petitioners gave immunized testimony (Pet. App. 24B-26B n.2). Petitioner does not challenge the concurrent factual determinations of the courts below that such sources existed, and thus his hypothetical independent source argument has no conceivable application with respect to this untainted evidence.

the remand hearing on that issue mandated by the court of appeals.[3]

Petitioner's complaints about the district court's references to a speculative independent basis for certain evidence and the possibility that government agents examined immunized testimony were not addressed by the court of appeals. Both of the district court's references were made in the context of the grand jury proceedings that will be subject to examination on remand (Pet. App. 2A-3A). On remand, the district court will have to determine whether the government made any use of their immunized testimony. Mere access to that testimony is not sufficient to establish taint. *United States* v. *Pantone*, 634 F.2d 716, 719-722 (3d Cir. 1980); *In re Grand Jury*, 524 F.2d 209, 219 (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976). Compare *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) (taint found when prosecutor read three volumes of defendant's immunized testimony prior to seeking indictment). These factbound questions should be decided in the first instance by the district court. Should that court rule against petitioners, they will be free to litigate that determination through post-remand appellate review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

---

[3]We note in this connection our disagreement with the holding of the court of appeals that dismissal of the indictment would be a proper remedy upon a showing that petitioners' immunized testimony had been directly or indirectly used before the grand jury. See *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966).

Office - Supreme Court, U S
FILED
DEC 13 1984
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-520

In The

Supreme Court of the United States

October Term, 1984

E. A. GREGORY and VONNA JO GREGORY,
Petitioners.

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE

Counsel for Petitioners

PETER F. BURNS
50 St. Emanuel Street
Post Office Box 1583
Mobile, Alabama 36633
(205) 432-0612

7pp

TABLE OF AUTHORITIES

Page

Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967) 1

Kastigar v. United States, 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653, reh den 408 U.S. 931, 33 L.Ed. 2d 345, 92 S.Ct. 2478 (1972). 4

Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964). . . . 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

E. A. GREGORY and VONNA JO GREGORY,

Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE

ISSUE

Whether the matters complained of in the petition are sufficiently certain and fixed to warrant review by this Court.

ARGUMENT

Whether an issue is ripe for judicial review depends upon the fitness of the issue for judicial decision and the hardship to the parties if court consideration is withheld. Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967). This case is ripe for review.

The issues are fit for review because the ruling of the Eleventh Circuit on those issues precludes further litigation before any tribunal other than this Court. The Eleventh Circuit specifically stated:

> "We affirm the holding of the district court in all respects as to the evidence considered." (Pet. App. 26B).

The government is mistaken where, in its memorandum, it states that:

> "On remand, the district court will have to determine whether the government made any use of their immunized testimony." (Memorandum p. 5).

The evidence that has been previously challenged by the Gregorys will not be dealt with on remand. The Eleventh Circuit remanded the case

> "..for the limited purpose of allowing the district court to ascertain whether the portions of the Government's evidence at trial not challenged by the Gregorys and the evidence before the grand jury, not formerly considered by the district court, were in fact 'derived from a legitimate source wholly independent of the compelled testimony.'" (Pet. App. 28B).

Thus, with regard to the trial and grand jury

evidence previously challenged by the Gregorys, this is the petitioners' last opportunity to redress the errors complained of in their petition.

Furthermore, if this court withholds its consideration, the petitioners will suffer irreparable damage. The unconstitutional analysis complained of in the petition was applied to the evidence most likely to have been obtained in violation of the petitioners' Fifth Amendment rights. With regard to that evidence, the government stated in its initial brief to the Eleventh Circuit:

> "A complete reading of the immune testimony (Def. Ex. 1) reveals that the Gregorys pointed out to the court, through the testimony of Linda Benson and the exhibits, every conceivable place in the testimony which could have led, either directly or indirectly, to anything connnected with the criminal investigation. Ms. Benson had available to her all of the Grand Jury testimony and 302 interview forms involved in the case, and traced out every possible connection between the immune testimony and the investigation." (Government's initial brief, U. S. Court of Appeals, Eleventh Circuit, p. 62).

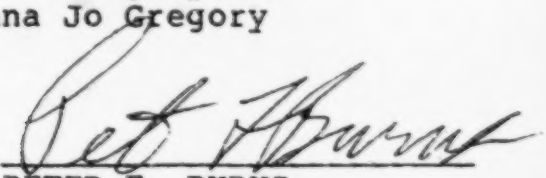
If that statement is accurate, the result of the hearing on remand is a foregone conclusion unless this Court intervenes.

The lower courts have made a mockery of the petitioners' Fifth Amendment rights and of this Court's holdings in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) and Kastigar v. United States, 406 U.S. 441 (1972). By ruling that government agents can listen to and study immunized testimony and by reasoning that the government would have come up with the same evidence anyway, the lower courts violated the petitioners' Fifth Amendment rights. The errors complained of were applied to the evidence most likely to have resulted from the immunized testimony. Those errors can only be remedied by this Court.

WHEREFORE, petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

MORGAN & BURNS
Attorneys for Petitioners
E. A. Gregory and
Vonna Jo Gregory

BY: 
PETER F. BURNS